

Brigham Young University Law School BYU Law Digital Commons

Utah Court of Appeals Briefs

1989

Curtis v. Curtis : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Richard b. Johnson; Johnson and Jackman; Attorney for Respondent.

Susan White Griffith; Utah Legal Services, Inc.; attorney for appellant.

Recommended Citation

Brief of Appellant, *Curtis v. Curtis*, No. 890210 (Utah Court of Appeals, 1989).

https://digitalcommons.law.byu.edu/byu_ca1/1767

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH COURT OF APPEALS
BRIEF

UTAH
DOCUMENT
KFU
50
.A10
DOCKET NO.

890210

IN THE UTAH COURT OF APPEALS

LAURALEE CURTIS,

Plaintiff-Appellant,

vs.

WILLIAM GREGORY CURTIS,

Defendant-Respondent.

*
*
*
*
*
*
*
*
*
*

Case No. 890210-CA

Argument Priority
Classification No. 7

BRIEF OF APPELLANT

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT OF UTAH
COUNTY, STATE OF UTAH, JUDGE BOYD L. PARK.

RICHARD B. JOHNSON
JOHNSON AND JACKMAN
1327 South 800 East
Suite 300
Orem, Utah 84058
225-1632

Attorney for Respondent

SUSAN WHITE GRIFFITH
UTAH LEGAL SERVICES, INC.
455 North University Avenue
Suite 100
Provo, Utah 84601
374-6766

Attorney for Appellant

AUG 10 1989

Mary E. Jackson
Clerk of the Court
Utah Court

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
JURISDICTION	1
NATURE OF PROCEEDING	1
STATEMENT OF ISSUES ON APPEAL	1
DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATE STATUTES	2
STATEMENT OF THE CASE	2
NATURE OF THE CASE	2
COURSE OF THE PROCEEDINGS	3
LOWER COURT DISPOSITION	6
STATEMENT OF FACTS	9
SUMMARY OF ARGUMENTS	13
ARGUMENT	14
I. MISSISSIPPI DOES NOT HAVE PROPER JURISDICTION UNDER THE UCCJA	14
A. Utah had continuing jurisdiction that had never been relinquished	14
B. Mississippi's own Court agreed that it did not have proper jurisdiction when the Petition to Modify was filed in February of 1988	20
C. The Mississippi trial court used the Relief from Domestic Abuse Statute to keep the children in the state of Mississippi through a protective order in effect for one year	21
D. It violates the purposes of the UCCJA to allow Mississippi to claim jurisdiction under the home state provision of the UCCJA for the Petition to Modify filed in November of 1988 after detaining the children in the State through the use of another Statute	21
II. MRS. CURTIS' PERSONAL APPEARANCE IN MISSISSIPPI DOES NOT ESTABLISH PROPER JURISDICTION UNDER THE UCCJA	28
A. Personal appearance in a custody case is not the standard for determining proper jurisdiction under the UCCJA	28

III. WHEN TWO STATES HAVE CONFLICTING CLAIMS TO CUSTODY, THE PARENTAL KIDNAPPING PREVENTION ACT (PKPA) CONTROLS, AND UNDER ITS TERMS UTAH IS THE PROPER FORUM	31
A. By the terms of the PKPA, it controls in cases of two states with conflicting claims, and Utah is the only state that meets both prongs of the test	31
CONCLUSION	32
ADDENDUM	34

TABLE OF AUTHORITIES

CASES

<u>Coppedge vs. Harding</u> , 714 P.2d 1121 (Utah, 1985)	. . . 7, 18, 19
<u>Harris v. Melnick</u> , Md. CtApp, No. 18-1988, 1/19/89	. . . 20, 21
<u>In re Marriage of Hopson</u> , 110 Cal. App.3d 884, 168 Cal.Rptr. 345 (Cal. Ct.App, 1980) 30, 31
<u>In the interest of W. D. v. Drake</u> , 103 Utah Adv. Rep. 26, (1989)	28
<u>Mosely v. Huffman</u> , 481 So.2d 231 (Miss., 1985) 29
<u>Rawlings v. Weiner</u> , 752 P.2d 1327, (Utah App., 1988)	. 16-18, 29

STATUTES

28 U.S.C.A., § 1738A 3, 32
Utah Code Ann., § 30-3-5(3) 3
Utah Code Ann., § 78-2a-3(2)(h) 2
Utah Code Ann., § 78-45c-1 <u>et. seq.</u> 3
Utah Code Ann., § 78-45c-14 17

IN THE UTAH COURT OF APPEALS

LAURALEE CURTIS,

Plaintiff-Appellant,

vs.

WILLIAM GREGORY CURTIS,

Defendant-Respondent.

*
*
*
*
*
*
*
*
*
*
*

Case No. 890210-CA

Argument Priority

Classification No. 7

BRIEF OF APPELLANT

JURISDICTION

The Court of Appeals has appellate jurisdiction over this domestic relations matter pursuant to Utah Code Ann., § 78-2a-3(2)(h).

NATURE OF PROCEEDING

This is an appeal from (1) a final Order dismissing the Plaintiff's Order to Show Cause in Contempt for failure to return the children from visitation, and (2) from a final Order enforcing a Mississippi Order which modified custody from the already existing Utah Decree of Divorce.

STATEMENT OF THE ISSUES ON APPEAL

I. Did the trial court err in hold that Mississippi had properly established jurisdiction under the Uniform Child Custody Jurisdiction Act (UCCJA)?

II. Did the trial court err in finding that Mrs. Curtis' personal appearance in the Mississippi litigation transferred UCCJA jurisdiction to Mississippi?

3. Did the trial court err in failing to apply the provisions of the Parental Kidnapping Prevention Act (PKPA) in resolving the conflicting claims of Utah and Mississippi?

DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATE STATUTES

Utah Code Ann., § 30-3-5(3):

The court has continuing jurisdiction to make subsequent changes or new orders for the support and maintenance of the parties, the custody of the children and their support, maintenance, health, and dental care, or the distribution of the property as is reasonable and necessary.

The Uniform Child Custody Jurisdiction Act, Utah Code Ann., § 78-45c-1 et. seq.

Parental Kidnapping Prevention Act of 1980, 28 U.S.C.A., § 1738A.

STATEMENT OF THE CASE

A. NATURE OF THE CASE.

This is an appeal concerning the proper jurisdiction to bring a divorce modification on the issue of custody. On January 12, 1989 Judge Boyd L. Park, from the Fourth Judicial District Court, heard proffer of counsel on an objection to the Domestic Commissioner's recommendation that Utah had continuing jurisdiction over custody and had not relinquished jurisdiction to Mississippi and did not recognize the Mississippi Orders. The Commissioner ordered that the children not be removed from the

state and that if Mr. Curtis came to Utah, he should have only supervised visitation. On March 7, 1989 Judge Park reversed the Commissioner's recommendation and issued a final Order dismissing the Plaintiff's Order to Show Cause in Contempt for failure to return the children from visitation and entered an Order enforcing the Mississippi Order which modified custody from the already existing Utah Decree of Divorce.

B. COURSE OF THE PROCEEDINGS.

The Decree of Divorce and Findings of Fact and Conclusions of Law were entered pursuant to a stipulation by the parties on December 4, 1987 by the Honorable Domestic Commissioner Howard H. Maetani of the Fourth Judicial District Court. (R. 66) Just over two months later, on February 12, 1988, Mr. Curtis took the children for visitation. (R. 406) He went to Mississippi and got a protective order against Mrs. Curtis entered on February 16, 1988 and remained in Mississippi. (R. 379) February 26, 1988, Mrs. Curtis' attorney in Mississippi filed a Motion to Dismiss for lack of jurisdiction which was not ruled on until after a hearing conducted February 29 through March 2, 1988. (R. 258) Both parties were present and represented by counsel in Mississippi. (R. 408) At the conclusion of the hearing, a protective order was entered against Mrs. Curtis. (R. 258) On March 8, 1988 the Court denied Mrs. Curtis' Motion to Dismiss for lack of jurisdiction. (R. 258) The Mississippi Court took the

Modification of a Foreign Decree under advisement. (R. 258) On August 9, 1988, the Mississippi Court took the case from under advisement and ruled that Mississippi did not have the proper jurisdiction to Modify the Utah Decree of Divorce. (R. 208-213) The Mississippi Court ruled that both states could lay claim to jurisdiction under the UCCJA, but the terms of the Parental Kidnapping Prevention Act made it clear Utah was the state of proper jurisdiction. However, they did not dissolve the Protective Order. (R. 213)

When the Mississippi Court ruled they did not have proper jurisdiction, but would not return her children because of the Protective Order, Mrs. Curtis contacted Legal Services in Utah. On August 17, 1988 Mrs. Curtis signed an Affidavit in Support of an Order to Show Cause in Contempt for failure to return the children from visitation. (R. 259) Because of difficulty in locating Mr. Curtis he was not served with the Order to Show Cause in Contempt until October. (R. 259, 260)

On September 23, 1988, Mrs. Curtis' Mississippi counsel filed a Motion to Dissolve the Protective Order. (R. 259) On October 7, 1988, Mrs. Curtis took the children back to Utah in accord with the Utah order that had not been modified and the Mississippi petition for modification having been dissolved. (R. 259) On October 24, 1988, Mr. Curtis filed contempt charges against Mrs. Curtis and filed a new Motion to Modify the Decree

of Divorce, under the same civil number as the already dismissed Petition. (R. 259-260) Because the Mississippi Courts had kept the Protective Order in force for eight months, even though the Mississippi Courts recognized that they did not initially have the authority to modify the Utah Decree, the Mississippi Court found that it did have jurisdiction over the children on the new Petition to Modify because the children had lived in Mississippi for longer than six months, in accordance with one provision in the UCCJA.

On November 10, 1988 the Order to Show Cause in contempt was conducted in Utah. Commissioner Maetani ordered that Utah had continuing jurisdiction and had not relinquished jurisdiction to Mississippi and therefore Utah did not recognize the orders made by the Mississippi Courts. (R. 260) Mr. Curtis filed an objection to this decision. (R. 377)

On November 22, 1988 the Mississippi Court issued an order requiring Mrs. Curtis to appear. (R. 260) When she did not, the court held her in contempt and issued sanctions.

December 6, 1988, the Mississippi Court ruled on the new Petition to Modify the Decree of Divorce that because the children had been in Mississippi for over six months, it had jurisdiction and the Court awarded Mr. Curtis custody. (R. 261)

In Utah on January 12, 1989, Judge Park took proffer of counsel on Mr. Curtis' objection to the Domestic Commissioner's

recommendation. (R. 377) The Court took the case under advisement. (R. 445)

On approximately January 23, 1989, counsel for Mrs. Curtis in Mississippi appealed the decision, which appeal is still pending.

The Utah Court's decision was issued March 7, 1989, and we appeal from that decision. (R. 359-364)

C. DISPOSITION IN THE COURT BELOW.

On March 7, 1989, Judge Boyd L. Park took the case from under advisement and found as follows:

(a) Mr. Curtis failed to return the children in violation of the Utah Decree of Divorce. (R. 347)

(b) Mrs. Curtis personally appeared and litigated issues in Mississippi as well as filed and responded to motions and that she had been present and had otherwise entered a general appearance in the Chancery Court of Scott County, State of Mississippi, and had participated in a three day trial there where she had been afforded all constitutional rights available to anyone in this country who is involved in litigation. (R. 350)

(c) A year after the litigation was initiated in Mississippi, and just prior to making this decision that we appeal from, Judge Park, pursuant to the language in Coppedge vs. Harding, 714 P.2d 1121 (Utah, 1985) conducted an extensive

telephone conference with Judge Hunter of the Chancery Court of Scott County, State of Mississippi, who presided over the matter concerning the merits and procedure of the case. During this conference both Courts recognized that the State of Utah and the State of Mississippi have adopted the Uniform Child Custody Jurisdiction Act, the provisions of which apply equally to both states. Both Courts also recognized that only one state--the state of continuing jurisdiction--has power to modify a divorce decree. Both Courts further adhered to the principle that only the state with continuing jurisdiction decides whether to decline the exercise of its jurisdiction over the Decree of Divorce. Both Courts concluded there can be no concurrent jurisdiction between the State of Utah and State of Mississippi and that under normal circumstances Utah has continuing jurisdiction to make subsequent changes or new orders concerning the custody of children when such matters have been previously decided in a Utah Decree of Divorce. Both Courts further agreed that the parties may avail themselves of another jurisdiction if one party meets the residency requirements of that jurisdiction and the other party appears for the purpose of hearing the matter on its merits. (R. 353-354)

The Court concluded as a matter of law that:

(a) The Court was mandated to follow Utah Code Ann., § 30-3-5 which provides for continuing jurisdiction. (R. 354, 359-360)

(b) The purpose of the UCCJA is to prevent a parent from wrongfully taking a child to another state to secure a custody change. (R. 354-355, 360)

(c) The Court concurs with the opinion that the 'clean hands doctrine' is incorporated in the UCCJA in that a court should refuse to assume jurisdiction to reexamine an out of state custody decree when the petitioner has engaged in some objectionable scheme to gain physical custody of the child in violation of the decree. (R. 355, 360) But there is no finding as to which party violated the 'clear hands doctrine.'

(d) Personal jurisdiction over a Defendant may be obtained by making a voluntary appearance after the filing of the action. (R. 356, 360-361)

(e) Seeking affirmative relief changes status from special appearance to that of a general appearance. (R. 356, 361-362)

(f) When Mrs. Curtis entered a personal appearance in Mississippi, and participated in the hearing, the result was that she made a general appearance and submitted herself to the jurisdiction of the Mississippi Court. (R. 357, 362)

(g) By filing a Motion to Dissolve the Protective Order in Mississippi Mrs. Curtis placed herself in Mississippi's jurisdiction. (R. 357, 362-363)

(h) The court found that Mrs. Curtis was not entitled to an Order to Show Cause holding Mr. Curtis in contempt, and that Mr.

Curtis was entitled to Enforcement of the Mississippi Order. (R. 358, 363)

D. STATEMENT OF THE FACTS.

During the course of the marriage the Respondent had been severely physically abusive with the Appellant and the children. Psychological reports which were conducted as part of the divorce action confirmed the abusive personality profile that Mrs. Curtis could testify to and that police reports on incidences of domestic violence would support. (R. 282-287) The homestudy evaluator suggested that the Defendant get custody of the older children because of his concern that if Mr. Curtis had all of the children taken from him, that he would resort to carrying out one or more of his threats to either kidnap the children or kill the whole family. (R. 284) In a supplement to the psychological report, written just five months before Mr. Curtis took the children to Mississippi, the evaluators revised their opinion based on their fear of what Mr. Curtis might do:

In addition, Lauralee (Mrs. Curtis) made a recent trip to Texas with Greg's (Mr. Curtis') approval to bring both Jolene and Jason back to Utah. When she arrived there with a friend, Linda Moulton, of Preston, Idaho, Greg had one of his typical tantrums, bashing in Lauralee's car, physically choking and bruising Linda and so on. Greg ended up spending the night in jail for disturbing the peace and Lauralee and Linda left, bringing only Jolene back to Provo. Jason was afraid to come with them because he feared that his dad might commit suicide or carry out another of his threats to physically harm someone. (emphasis added)

Given this new information by Jolene and Lauralee it would seem that Greg and Lauralee's patterns are

becoming more and more clear, i.e., Lauralee is stabilizing her living situation and her emotional state, while Greg is deteriorating. I still have a legitimate fear that Greg might physically harm himself or others, especially if full custody is given to Lauralee. Based on their activities, however, of the past several months and for the children's welfare, I would like to amend any previous recommendation and suggest (1) that full custody of all the children be granted to Lauralee; or (2) that custody of all the children except Dale (age 16) be granted to her. It appears, at this time, that Dale prefers living with his father, although I have not visited with him directly. Jolene reports that he is smoking dope and is somewhat unruly. Before final custody is granted, an interview with Dale is recommended. (R.287)

It would have been very difficult for Mr. Curtis to go to trial with this evaluation. The parties stipulated that the three oldest children would be allowed to choose who they wanted to reside with, and Mrs. Curtis was to have custody of the four youngest children. The two oldest sons initially went with Mr. Curtis.

Just two months after the Decree of Divorce had been entered, on February 12, 1988, Mr. Curtis took the children for a regularly scheduled weekend visitation. (R. 406) When he picked up the children, he briefly spoke with Mrs. Curtis. Mr. Curtis had been exercising visitation every other weekend since the divorce. He did not mention on this occasion that he intended to take the children out of the state for the visitation. (R. 407) As Mr. Curtis was driving off with the children, he said something to the effect that she 'would get her Valentine's present.' (R.257) This made Mrs. Curtis suspicious and she went

to his landlord who told her that his apartment had been cleaned out and was empty. (R. 407) Mrs. Curtis went to the police and County Attorney and asked for help but was told there was nothing they could do until he was late coming back from the visitation. (R. 407) Mrs. Curtis had no idea where Mr. Curtis had taken the children until about a week later when she received papers in the mail indicating that Mr. Curtis had filed for custody under the Relief from Domestic Abuse provisions of the Mississippi Statutes and a hearing deciding custody was scheduled for February 29, 1988. (R. 408) This was the first time that Mrs. Curtis knew that the children were in Mississippi. When Mrs. Curtis went back to the County Attorney's Office, they told her it was custodial interference and if Mr. Curtis even came back into Utah they would arrest him. Other than that, there was nothing they could do. Ironically, later when Mississippi issued a warrant for Mrs. Curtis' arrest for taking the children back to Utah, even though their own Court admitted they did not have jurisdiction, it was Utah County Law Enforcement officers who arrested her, and the Utah County Attorney's Office that pressed charge against her based on the Mississippi Warrant.

Mrs. Curtis contacted an attorney in Utah and he advised her to appear in Mississippi. Mrs. Curtis contacted Legal Services in Mississippi and they agreed to help her try to dismiss the case. On February 26, 1988, Mrs. Curtis' counsel in Mississippi

had filed a Motion to Dismiss based on improper jurisdiction. This motion was not ruled on prior to the scheduled hearing. The Court planned to proceed with the litigation, which was conducted February 29-March 2, 1988. At the conclusion of the proceeding in Mississippi, the Court entered a Protective Order against Mrs. Curtis and took the issue of Modification of the Utah Decree under advisement. (R. 258) Five months after taking the issue under advisement, on August 9, 1988, the Mississippi Court decided that did not have jurisdiction to Modify the Utah Decree under the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act, but the Mississippi Court still did not dissolve the Protective Order. (R. 208 - 213) In August of 1988, Appellant contacted Utah Legal Services in an attempt to get relief from the Utah Courts. In August the Appellant signed an Affidavit in Support of the Order to Show Cause in Re Contempt. Because of difficulties in serving the Respondent, the Order to Show Cause was not held until November 10, 1988. (R. 259, 260) The Order to Show Cause was conducted before Domestic Commissioner Howard Maetani who ruled that Utah had not relinquished jurisdiction and did not recognize the Mississippi Order. (R. 156) Mr. Curtis objected to the Commissioner's recommendation and requested a hearing before a judge. (R. 377) The rest of the case history is recited under "Course of Proceedings" above.

SUMMARY OF THE ARGUMENT

Mississippi does not have proper jurisdiction under the UCCJA. Utah had continuing jurisdiction that had never been relinquished. Mississippi's own Court agreed that it did not have proper jurisdiction when the Petition to Modify was filed in February of 1988. The Mississippi trial court used the Relief from Domestic Abuse Statute to keep the children in the state of Mississippi through a protective order in effect for one year. It violates the purposes of the UCCJA to allow Mississippi to claim jurisdiction under the home state provision of the UCCJA for the Petition to Modify filed in November of 1988 after detaining the children in the State through the use of another Statute.

Mrs. Curtis' personal appearance in Mississippi does not establish proper jurisdiction under the UCCJA. Personal appearance in a custody case is not the standard for determining proper jurisdiction under the UCCJA. The purpose of the UCCJA is to set uniform standards for determining the best state to hear the custody issues--no where does it indicate that personal appearance waives the Court responsibility to look at the bases of jurisdiction.

When two states have conflicting claims to custody, the Parental Kidnapping Prevention Act controls, and under its terms Utah is the proper forum. By the very terms of the PKPA, it

controls in cases of two states with conflicting claims. Utah is the only state that meets both prongs of the test. Therefore, it would violate the policy of the UCCJA to uphold and enforce the Mississippi Order. Utah was and is the proper jurisdiction for a divorce modification proceeding.

ARGUMENT

I. MISSISSIPPI DID NOT AND DOES NOT NOW HAVE PROPER JURISDICTION UNDER THE UCCJA

A. Utah had continuing jurisdiction that had never been relinquished at the time Mississippi entered its Orders.

The Utah trial court found that Utah retains continuing jurisdiction pursuant to Utah Code Ann., § 30-3-5(3):

The Court has continuing jurisdiction to make subsequent changes or new orders for the support and maintenance of the parties, the custody of the children and their support, maintenance, health, and dental care, or the distribution of the property as is reasonable and necessary.

Because Utah had admittedly been the state with the original jurisdiction it maintains jurisdiction to make changes in custody. Especially since the Utah Court had such recent (the Divorce had been final for only 10 weeks) information, including psychological evaluations on the parties and their children the Utah Court was the only appropriate Court in which to seek a modification.

The Utah Court of Appeals recently affirmed that Utah trial courts have continuing jurisdiction after an initial Decree is

awarded in Utah. Rawlings v. Weiner, 752 P.2d 1327, (Utah App., 1988). The facts of this case differ from the Curtis case in that the primary issue in Rawlings was visitation, not custody. Also in Rawlings both Courts conferred and agreed that Utah was the appropriate jurisdiction. A judges conference did not happen for over year after the matter was filed in Mississippi.

Mr. Curtis argues that because there was no action pending in Utah at the time he filed in Mississippi, Mississippi had no obligation to contact the Utah Courts. The Court refutes this in Rawlings.

In Rawlings the custodial parent moved to another state. When the non-custodial parent filed an order to show cause in Utah, the custodial parent asked for a transfer of venue. The Utah Court denied the transfer of venue and the Court of Appeals affirmed the trial court's decision. The Court of Appeals recognized that the Utah trial court had continuing jurisdiction pursuant to Utah Code Ann., § 30-3-5(3). The analysis of the court's holding in response to the custodial parent's argument that the state was an inconvenient forum applies directly to the Curtis case:

Only if Utah chooses to relinquish jurisdiction, based on the best interests of the children, will such jurisdiction transfer.

The Court then noted in footnote 4:

It may be argued that jurisdiction may be obtained through the emergency provision in section 78-45c-3(1)(c) as was done in this case. However, accepting

such jurisdiction on an emergency basis does not give permanent jurisdiction. The court is still required to contact the original state Court to determine which court is most convenient and best serves the interests of the children and the parties.

According to footnote 4, even if the Mississippi Court was acting pursuant to the emergency circumstances provision in granting the protective order, the Mississippi Court was still required to contact the Utah Court.

In a concurring opinion in Rawlings, Judge Bench referred to the Commissioner's note to Utah Code Ann., § 78-45c-14:

Courts which render a custody decree normally retain continuing jurisdiction to modify the decree under local law. Courts in these states have in the past often assumed jurisdiction to modify the out-of-state decree themselves without regard to the preexisting jurisdiction of the other state. In order to achieve greater stability of custody arrangements and avoid forum shopping, subsection (a) declares that other states will defer to the continuing jurisdiction of the court of another state as long as that state has jurisdiction under the standards of this Act. In other words, all petitions for modification are to be addressed to the prior state if that state has sufficient contact with the case to satisfy § 3.

Judge Bench concluded:

At Rawling's request, Washington took emergency jurisdiction under UCCJA. On discovering that Utah had continuing jurisdiction over custody, Washington declined any further jurisdiction under section 14(1). That was precisely what should have happened under UCCJA. Because Utah had primary jurisdiction over custody of the children, I concur in affirming the judgment of the trial court. Id. at 1330.

In the Curtis case, Utah did have sufficient contact with the children to satisfy § 3, so the Mississippi Court should have

contacted Utah prior to conducting a hearing. Mississippi should have declined further jurisdiction as the State of Washington did in Rawlings.

The Utah Supreme Court ruled that a Court must contact the original Court in Coppedge v. Harding, 714 P.2d 1121 (Utah, 1985). In Coppedge the grandparents of the child were the first to file and serve from the Oregon Court. There had been no previous Utah order, because the child had been born and raised in Utah and was voluntarily sent to Oregon. The parents in Utah were given poor advice by an attorney not to respond to the Oregon petition because they did not have jurisdiction. When the parents began to understand that they were about to lose custody of the child they had voluntarily sent to Oregon to live with his grandparents for the school year, they filed an action in Utah. Judge Harding acted in accordance with what seemed a reasonable request: Enter a Order allowing the natural parents to be able to retain custody of their own child, especially since there were no allegations of unfitness. When the grandparents sought the writ of mandamus from the Supreme Court, the Court must certainly have been sympathetic with the Utah couple and the facts of the case. But the Supreme Court understood that if the Uniform Child Custody Jurisdiction Act is ever going to have real effect, it is essential for a court learning of a prior proceeding in another state, to contact the original state. Because Utah did not

contact the Oregon Court, the Supreme Court sent a firm message to the trial courts: We will not uphold your orders unless you comply with the terms of the UCCJA. In the Curtis case, an order had been made, Utah made the initial decree and had continuing jurisdiction. When Mississippi was made aware of this fact, they should have contacted Utah.

Mr. Curtis argued that pursuant to Coppedge, the Utah Court should have contacted the Mississippi Court when it realized that there was an action pending because the Mississippi Orders had been filed in the Utah Court file. Mr. Curtis then argues that because Mrs. Curtis' Affidavit in Support of an Order to Show Cause In Contempt did not specify that she had appeared in a hearing in Mississippi that the Commissioner entered the wrong recommendation. Mrs. Curtis' Affidavit was meant to support an Order to Show Cause, not to fulfill the requirements of Utah Code Ann., § 78-45c-9. Although, the Plaintiff's affidavit does not specify that she attended the proceeding, the Commissioner was informed verbally at the Order to Show Cause of the specific proceedings as they occurred in Mississippi. Opposing Counsel was present and had the opportunity to put forth any additional information that the Court was not aware of. When the Commissioner made his recommendation he knew of the action in Mississippi, of the litigation that took place there, and of the current status. The Commissioner determined, based on all of the

facts, that because Utah had never relinquished jurisdiction, therefore, Utah did not recognize the orders of the Mississippi Court. The Plaintiff's affidavit outlined enough facts to give the Commissioner notice that another proceeding had been initiated in Mississippi. But because Utah had continuing jurisdiction that had never been relinquished, Commissioner Maetani held that it was the Mississippi Court's responsibility to contact the Utah Court.

In a very recent case, Harris v. Melnick, Md. CtApp, No. 18-1988, 1/19/89, the court quotes Professor Brigitte M. Bodenheimer, who wrote Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction Under the UCCJA, 14 Fam. L.Q. 203, 215 (1981):

...the rule governing modification jurisdiction are markedly different from the rules applicable to initial jurisdiction.

The court goes on to conclude:

This means that only one state--the state of continuing jurisdiction--has power to modify the custody decree. Only that state decides whether to decline the exercise of its jurisdiction of any particular case. The rule is clear and simple. There can be no concurrent jurisdiction and no jurisdictional conflict between two states.

According to the Court in Harris, Courts generally give the decree rendering state a strong presumption of continuing modification jurisdiction until all or almost all connection with the parents and child is lost.

Appellate Courts are adopting the position that custody should be determined by the home state as set forth in the UCCJA. Prior to another state modifying that decree, the state of original jurisdiction must relinquish its jurisdiction. In the Curtis case, the Utah court had not relinquished its jurisdiction, regardless of whether the Plaintiff appeared personally in the proceedings in Mississippi or not. Based on the analysis of the Harris case, as well as the other case law previously cited, Utah had not relinquished jurisdiction over the Curtis children at the time the Mississippi Orders were entered.

B. Mississippi's own Court agreed that it did not have proper jurisdiction when the Petition to Modify was filed in February of 1988.

On August 9, 1988, the Mississippi Court Dismissed the Petition to Modify the Foreign Decree, finding that under the UCCJA both states could make claim to jurisdiction, but the PKPA was determinative, and only Utah met both of the standards under that act. At that time, Mrs. Curtis had already entered her personal appearance, yet this was not enough for the Mississippi Court to determine that jurisdiction should remain in Mississippi. By the Court's own ruling, Mississippi did not have proper jurisdiction, regardless of how it could be acquired (emergency circumstances, best interests, consent, etc.) Therefore, the Mississippi Court never entered a finding that it

took jurisdiction pursuant to the emergency circumstances provision of the UCCJA.

C. The Mississippi trial court used the Relief from Domestic Abuse Statute to keep the children in the state of Mississippi through a protective order in effect for one year.

The Mississippi trial court in effect, circumvented the entire UCCJA, by entering a one year protective order keeping the children in the state of Mississippi. After the children had been in the state for over six months, the UCCJA could be applied and a permanent Petition to Modify Custody could be awarded. Allowing the Mississippi Court to use the state protective order statute to supercede the UCCJA is a violation of the purpose of the UCCJA, and undermines its entire purpose. This policy increases the potential for conflict with other court orders and hinders cooperation with courts of other states.

D. It violates the purposes of the UCCJA to uphold and enforce the Mississippi Order and to allow Mississippi to claim jurisdiction under the home state provision of the UCCJA for the Petition to Modify filed in November of 1988 after detaining the children in the State through the use of the state protective order statute.

In Utah Code Ann., § 78-45c-1 the purposes of the adoption of the UCCJA are enumerated. They include: (a) avoid jurisdiction competition and conflict ... which have resulted in

shifting of children from state to state....; (b) promote cooperation with the courts....; (c) assure that litigation ... take place ... in the state with which the child and his family have the closest connection; (d) discourage continuing controversies....; (e) deter abductions and other unilateral removals of children undertaken to obtain custody awards; (f) avoid relitigation of custody decisions....; (g) facilitate the enforcement of custody decrees of other states; (h) promote and expand the exchange of information....; (i) to make uniform the law of those states which enact it.

The purposes for adopting the UCCJA are important to the Curtis case because they explain the intent of the drafters in how the procedure should apply in a contest of jurisdiction case.

Mr. Curtis did take the children on a regularly scheduled visitation. He had previously made arrangements with Mrs. Curtis for an extended weekend visitation. After getting the children in the car his parting words to her were to the effect that she 'would get her Valentines' present.' Mrs. Curtis knew after that statement that Mr. Curtis was going to try to do something. Mrs. Curtis called his landlord and learned that he had cleared out the residence. Mrs. Curtis contacted the police and was told that there was nothing they could do until his visitation period was over with.

It was not until Mrs. Curtis was mailed copies of the papers from Mississippi that she knew where Mr. Curtis had taken the children.

Mr. Curtis alleges that he had every intention of returning the children after the weekend, and illustrates this by saying that he purchased round trip tickets, but when he "learned of the serious nature of the abuse" he felt the need to file for immediate relief. Never does Mr. Curtis explain why he did not tell Mrs. Curtis that he was taking the children out of the state during the visitation, nor does he explain why, if he was going to come back on his round trip tickets, he cleaned out his residence in Utah.

The purpose of the adoption of the UCCJA is to prevent the removing of children from one jurisdiction to another. Mr. Curtis argues that he did not take the children illegally. Perhaps, because of the way that Mr. Curtis arranged the move to Mississippi he might not be convicted of a criminal offense, although the Utah trial court did find that not returning the children was a violation of the Decree of Divorce. Mr. Curtis has never been forced to answer how the circumstances were conveniently set up. In Utah homestudies had been completed where there had been a visit to both homes, psychological evaluations completed on both parties and the children had been interviewed. In the home evaluation conducted by the Scott

County Social Services Department in Mississippi, a social worker went to the home and spoke with the children. Even with that minimal amount of evaluating, the social worker reported that three of the children reported to the worker that they wanted to live with their mother. The younger children state that their father is gone to work before they get up, and he returns home after they are in bed, six days a week. Yet Mrs. Curtis was not even consulted in the course of the Mississippi home evaluation. In a later evaluation by the same social worker, the oldest daughter told her that they had been told what to say by their father. The Social Worker later testified that she had no reason to disbelieve the daughters last version of the facts. There was not the same type of evidence available in Mississippi as there was in Utah.

All of the alleged acts of negligence and abuse by Mrs. Curtis would have occurred in the State of Utah, if they had taken place. Yet there has never, even as of yet, been an investigation of Mrs. Curtis' home in Utah. There has never been so much as a referral made to the Division of Family Services in Utah.

To allow the non-custodial parent to take the children legally on a visitation, go to another state and file under their abuse statute, when the acts complained of occurred in the original state, violates the policy and purposes of the UCCJA.

At the time Mr. Curtis took the children to Mississippi, he did not even have residency there. Through the provisions of the Protection from Domestic Abuse Law, Mr. Curtis was allowed to get the protective order and therefore, a custody order. It has never been explained why Mr. Curtis could not have gone back to Utah, on his round trip tickets, and filed for a protective order on the children and filed for a modification in Utah if the abuse the children told him about was so severe. The evidence of the abuse would have been located in Utah, since the incidence allegedly took place there.

Mr. Curtis violated the purpose of subsection (a) by shifting the children from Utah to Mississippi, and causing a jurisdictional conflict that could easily have been avoided.

At the time Mr. Curtis got the Ex Parte Protective Order, he and the children had been in Mississippi for four days. Moving the children to Mississippi was a blatant violation of the purpose listed in subsection (c), "assure that litigation ... take place ... in the state with which the child and his family have the closest connection....;" Mississippi contained no evidence of the abuse that was alleged to have occurred in Utah. Utah assuredly had the closest connection with the family at this point and could have provided the best evidence that the abuse did or did not occur. In fact, psychological evaluations had been completed by both Mr. and Mrs. Curtis during the course of

the divorce proceedings. The psychologists could have been available to testify in an abuse proceeding if it had been conducted in Utah. The evaluations explained that Mr. Curtis had scores which are common to one who takes the law into his own hands. In fact, the evaluators later reconsidered their initial determination that Mr. Curtis could possibly have custody of the older children because a later violent incident. The evidence that is in Utah would have been very important in making an accurate determination on the issues of abuse.

Subsection (d) states that the purpose is to discourage continuing controversies over child custody. If Mississippi were allowed to take jurisdiction, it would set a dangerous precedent contrary to the intent of the UCCJA. Arguably there would be nothing to stop Mrs. Curtis from exercising visitation with the children in Mississippi, taking them to Florida (or any other state), filing for a protective order based on events alleged to have taken place in Mississippi and then getting an order from the Florida court. The procedure of taking the children from state to state could go on indefinitely.

Mr. Curtis has alleged that he removed the children legally, but subsection (e) addresses the unilateral removal of the children undertaken to obtain custody awards. It has never been disputed that this was a unilateral removal, and the removal would constitute a violation of the purposes of the Act.

It is important to keep in mind that the Utah Decree of Divorce was 10 weeks old when Mr. Curtis took the children to Mississippi. Mr. Curtis holds strongly to the position that because the Mississippi Court entered findings after three days of hearing on the protective order, that he was justified in removing the children. It is not hard to imagine how he would be able to get these findings when all of Mrs. Curtis' evidence would obviously be in Utah, since that is where the alleged instances occurred and all of the witnesses would be located. Mrs. Curtis' counsel in Mississippi was prepared to argue jurisdiction, but with the short amount of time between Mrs. Curtis' receiving notice, securing counsel and getting to Mississippi, she had little time and resources to refute the testimony that Mr. Curtis had prepared. For this very reason, the drafters of the UCCJA determined one of the purposes is to have the case heard in the state with the "closest connection and where significant evidence" to the family is located. The importance of ruling in conformity with this purpose was illustrated in the recent case In the interest of W. D. v. Drake, 103 Utah Adv. Rep. 26, (1989). The court ruled that "In the instant case, substantial information concerning the parents' abilities and past history was in California. The mother had only recently come to Utah, but had lived for years in California." Id. at 28. Because the

best information, and the substantial information concerning the Curtis family was in Utah, jurisdiction should be in Utah.

II. MRS. CURTIS' PERSONAL APPEARANCE IN MISSISSIPPI DOES NOT ESTABLISH PROPER JURISDICTION UNDER THE UCCJA

A. Personal appearance in a custody case is not the standard for determining proper jurisdiction under the UCCJA.

Personal appearance in litigation is not the standard that creates appropriate jurisdiction under the UCCJA. The Court ruled that because Mrs. Curtis personally appeared in the proceeding in Mississippi that total jurisdiction would transfer to Mississippi. This has not been the recent trend of other courts to address this same issue. See Rawlings discussed above. Mrs. Curtis did not give up her right to challenge the appropriate jurisdiction under the UCCJA or PKPA.

The Plaintiff initially tried to have the action dismissed for lack of jurisdiction, but when it became apparent that Mississippi would hear the case with or without Mrs. Curtis, she did personally appear. Other cases have held that personal appearance does not effect subject matter jurisdiction covered by the UCCJA. In Mosely v. Huffman, 481 So.2d 231 (Miss., 1985) a child's grandparents abducted the child from Mississippi and took her to Arizona. The child resided in Arizona for over two years before the child's parents found her. The grandparents initiated an action in Arizona which the parents personally appeared in.

The Supreme Court of Mississippi upheld the lower court that ruled:

For the authorities to take the position and now tell this mother, "You cannot have the custody of your child," because of a hypertechnicality, when the authorities provided little or no assistance in locating the child from the outset would, in the opinion of this Court, be an injustice. To now rule that the state of residence of the grandmother is the state of jurisdiction would be to reward the initiator of a wrong. Neither the grandmother, by abducting the child, nor the mother, upon submitting herself to the Arizona court can defeat the rights of this child and deprive or relieve this court of its constitutional duty. Original jurisdiction was, is, and remains vested in the Chancery Court of the State of Mississippi. Id. at 238.

In Mosley the grandparents blatantly abducted the child. They arranged with the parents to take the child on a visit and then did not return. Mr. Curtis did the same thing on his visitation, except that he "legitimized" it by getting a protective order with only a matter of days notice to Mrs. Curtis and when the alleged acts occurred in another state.

In re Marriage of Hopson, 110 Cal. App.3d 884, 168 Cal.Rptr. 345 (Cal. Ct.App 1980) dealt with a case where a father wrongfully took his two children from California to Tennessee, although it was not certain that in doing so he violated a custody decree, and initiated proceedings in Tennessee to modify the Arizona custody decree. Seventeen months later a final judgment awarding custody to the father was entered. Thereafter, the mother sought enforcement of the Arizona custody order in

California. The father argued that the mother appeared personally in Tennessee to defend. The trial court sustained the father and dismissed the petition. The California Court of Appeals reversed and observed that the res judicata effect of a custody decree was dependent upon the court having personal and subject matter jurisdiction, and the exclusive method of determining subject matter jurisdiction in child custody cases was the UCCJA, which superseded any contrary decisional and statutory law. The court in Hopson then observed: "There is no provision in the act for jurisdiction to be established by reason of the presence of the parties or by stipulation or consent." Id at 350-351.

The court noted that the UCCJA distinguishes illegal removal or detention from all other custody violations, but the court stated: Giving recognition to the Tennessee decree condones the father's behavior and encourages unlawful abduction; it invites parental manipulation and deceit, while undermining the basic parent-child relationship." The Mississippi ruling certainly invites "parental manipulation and deceit."

Mrs. Curtis' personal appearance in Mississippi is not the determinative factor in deciding proper jurisdiction. Jurisdiction must be determined according to the UCCJA.

It is contrary to the policy and purposes of the Uniform Child Custody Jurisdiction Act to assume that because a state has

personal jurisdiction that the state may then automatically assume jurisdiction under the UCCJA.

One of the purposes of the UCCJA is to set uniform standards for determining the best state to hear the custody issues--no where does it indicate that personal appearance waives the Court's responsibility to look at the bases of jurisdiction.

III. WHEN TWO STATES HAVE CONFLICTING CLAIMS TO CUSTODY, THE PARENTAL KIDNAPPING PREVENTION ACT CONTROLS, AND UNDER ITS TERMS UTAH IS THE PROPER FORUM

A. By the terms of the PKPA it controls in cases of two states with conflicting claims.

In the August 9, 1988, Order from the Mississippi Court, the Mississippi court did rule that where both states had claims to jurisdiction under the UCCJA, their claim must yield to a Federal Act of Congress, namely the Parental Kidnapping Prevention Act of 1980, 28 U.S.C.A., § 1738A. This statute provides:

(f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if--

(1) it has jurisdiction to make such a child custody determination, and

(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

Utah had not ever relinquished jurisdiction prior to the entry of any of the Mississippi orders. But more importantly, where two states have claim to jurisdiction, the PKPA, a Federal Act, requires that a modification can only occur where the

modifying state has jurisdiction and the Court of the prior state no longer has jurisdiction or has declined to exercise it. It is clear that at least until Judge Park contacted Mississippi's judge, Utah had not ever relinquished jurisdiction. All of the orders currently standing in Mississippi were entered prior to that time. Judge Park should not have relinquished jurisdiction. At any given point, prior to Mississippi entering an order, Mississippi could not meet both prongs of the PKPA standard.

CONCLUSION AND STATEMENT OF THE RELIEF SOUGHT

A reversal of the trial court's decision to dismiss Mrs. Curtis' Order to Show Cause in Contempt and a reversal of the Order to Enforce the Mississippi Order. More specifically, Mrs. Curtis seeks the following:

1. A determination that Mississippi, did not have proper jurisdiction under the UCCJA.
2. A determination that Mrs. Curtis' personal appearance in Mississippi did not establish proper jurisdiction under the UCCJA.
3. A determination that Utah was and is the proper jurisdiction to modify the Decree of Divorce.
4. A determination that the PKPA controls when two states have conflicting claims to custody, and only Utah meets both prongs of the test.

5. A reversal of the trial court's order to dismiss the Order to Show Cause in Contempt, and a reinstatement of the Domestic Commissioner's Order that Mrs. Curtis should retain custody, and that visitation by Mr. Curtis should be supervised.

6. An award of attorney's fees and costs to Mrs. Curtis to be paid by Mr. Curtis for Mrs. Curtis' attorney's benefit. Plaintiff does not have the financial resources to pay her attorney's fees and costs in this appeal, yet she has been forced to incur such fees and costs to pursue her rights in this matter.

DATED this 10 day of August, 1989.


UTAH LEGAL SERVICES, INC.
By Susan White Griffith
Attorney for Plaintiff-Appellant

CERTIFICATE OF MAILING

I hereby certify that I personally hand carried and delivered eight true and accurate copies of the above Appellant's Brief to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102 and ~~two~~⁴ true and accurate copies to Richard Johnson, Attorney at Law, 1327 South 800 East, Suite 300, Orem, Utah 84058, this 10th day of August, 1989.


UTAH LEGAL SERVICES, INC.
By Susan White Griffith
Attorney for Plaintiff-Appellant

ADDENDUM

Utah Code Ann., § 78-45c-1, et seq. (Uniform Child Custody
Jurisdiction Act, (UCCJA)).

28 USCS, § 1738A (Parental Kidnapping Prevention Act,
PKPA).

CHAPTER 45b

PUBLIC SUPPORT OF CHILDREN

(Repealed by Laws 1985, ch. 10, § 2; 1987, ch. 161, § 314; 1988, ch. 1, § 407.)

78-45b-1 to 78-45b-25. Repealed.

CHAPTER 45c

UNIFORM CHILD CUSTODY JURISDICTION

Section	
78-45c-1.	Purposes — Construction.
78-45c-2.	Definitions.
78-45c-3.	Bases of jurisdiction in this state.
78-45c-4.	Persons to be notified and heard.
78-45c-5.	Service of notice outside state — Proof of service — Submission to jurisdiction.
78-45c-6.	Proceedings pending elsewhere — Jurisdiction not exercised — Inquiry to other state — Information exchange — Stay of proceeding on notice of another proceeding.
78-45c-7.	Declining jurisdiction on finding of inconvenient forum — Factors in determination — Communication with other court — Awarding costs.
78-45c-8.	Misconduct of petitioner as basis for refusing jurisdiction — Notice to another jurisdiction — Ordering petitioner to appear in other court or to return child — Awarding costs.
78-45c-9.	Information as to custody of child and litigation concerning required in pleadings — Verification — Continuing duty to inform court.
78-45c-10.	Joinder of persons having custody or claiming custody or visitation rights.
78-45c-11.	Ordering party to appear — Enforcement — Out-of-state party — Travel and other expenses.
78-45c-12.	Parties bound by custody decree — Conclusive unless modified.
78-45c-13.	Recognition and enforcement of foreign decrees.
78-45c-14.	Modification of foreign decree — Prerequisites — Factors considered.
78-45c-15.	Filing foreign decree — Effect — Enforcement — Award of expenses.
78-45c-16.	Registry maintained by clerk of court — Documents entered.

Section	
78-45c-17.	Certified copies of decrees furnished by clerk of court.
78-45c-18.	Taking testimony of persons in other states.
78-45c-19.	Request to court of another state to take evidence, to make studies or to order appearance of party — Payment of costs.
78-45c-20.	Taking evidence for use in court of another state — Ordering appearance in another state — Costs — Enforcement.
78-45c-21.	Preservation of records of proceedings — Furnishing copies to other state courts.
78-45c-22.	Requesting court records from another state.
78-45c-23.	Foreign countries — Application of general policies.
78-45c-24.	Priority on court calendar.
78-45c-25.	Notices — Orders to appear — Manner of service.
78-45c-26.	Short title.

78-45c-1. Purposes — Construction.

(1) The general purposes of this act are to:

(a) avoid jurisdiction competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being;

(b) promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child;

(c) assure that litigation concerning the custody of a child take place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state;

(d) discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;

(e) deter abductions and other unilateral removals of children undertaken to obtain custody awards;

(f) avoid relitigation of custody decisions of other states in this state insofar as feasible;

(g) facilitate the enforcement of custody decrees of other states;

(h) promote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerned with the same child; and

(i) to make uniform the law of those states which enact it.

(2) This title shall be construed to promote the general purposes stated in this section. 1980

78-45c-2. Definitions.

As used in this act:

(1) "Contestant" means a person, including a parent, who claims a right to custody or visitation rights with respect to a child;

(2) "Custody determination" means a court decision and court orders and instructions provid-

ing for the custody of a child, including visitation rights; it does not include a decision relating to child support or any other monetary obligation of any person;

(3) "Custody proceeding" includes proceedings in which a custody determination is one of several issues, such as an action for dissolution of marriage, or legal separation, and includes child neglect and dependency proceedings;

(4) "Decree" or "custody decree" means a custody determination contained in a judicial decree or order made in a custody proceeding, and includes an initial decree and a modification decree;

(5) "Home state" means the state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the six-month or other period;

(6) "Initial decree" means the first custody decree concerning a particular child;

(7) "Modification decree" means a custody decree which modifies or replaces a prior decree, whether made by the court which rendered the prior decree or by another court;

(8) "Physical custody" means actual possession and control of a child;

(9) "Person acting as parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by the court or claims a right to custody; and

(10) "State" means any state, territory or possession of the United States, the Commonwealth of Puerto Rico, and the District of Columbia.

1980

78-45c-3. Bases of jurisdiction in this state.

(1) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if the conditions as set forth in any of the following paragraphs are met:

(a) This state (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within six months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state;

(b) It is in the best interest of the child that a court of this state assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this state, and (ii) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(c) The child is physically present in this state and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or

(d) (i) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with Paragraphs (a), (b), or

(c), or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.

(2) Except under Paragraphs (c) and (d) of Subsection (1), physical presence in this state of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this state to make a child custody determination.

(3) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.

1980

78-45c-4. Persons to be notified and heard.

Before making a decree under this act, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated, and any person who has physical custody of the child. If any of these persons is outside this state, notice and opportunity to be heard shall be given pursuant to Section 78-45c-5.

1980

78-45c-5. Service of notice outside state — Proof of service — Submission to jurisdiction.

(1) Notice required for the exercise of jurisdiction over a person outside this state shall be given in a manner reasonably calculated to give actual notice, and may be made in any of the following ways:

(a) by personal delivery outside this state in the manner prescribed for service of process within this state;

(b) in the manner prescribed by the law of the place in which the service is made for service of process in that place in an action in any of its courts of general jurisdiction;

(c) by any form of mail addressed to the person to be served and requesting a receipt; or

(d) as directed by the court (including publication, if other means of notification are ineffective).

(2) Notice under this section shall be served, mailed, delivered, or last published at least 10 days before any hearing in this state.

(3) Proof of service outside this state may be made by affidavit of the individual who made the service, or in the manner prescribed by the law of this state, the order pursuant to which the service is made, or the law of the place in which the service is made. If service is made by mail, proof may be a receipt signed by the addressee or other evidence of delivery to the addressee.

(4) Notice is not required if a person submits to the jurisdiction of the court.

1980

78-45c-6. Proceedings pending elsewhere — Jurisdiction not exercised — Inquiry to other state — Information exchange — Stay of proceeding on notice of another proceeding.

(1) A court of this state shall not exercise its jurisdiction under this act if at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with this act, unless the proceeding is stayed by the court of the other state because this state is a more appropriate forum or for other reasons.

(2) Before hearing the petition in a custody proceeding the court shall examine the pleadings and other information supplied by the parties under Sec-

tion 78-45c-10 and shall consult the child custody registry established under Section 78-45c-16 concerning the pendency of proceedings with respect to the child in other states. If the court has reason to believe that proceedings may be pending in another state it shall direct an inquiry to the state court administrator or other appropriate official of the other state.

(3) If the court is informed during the course of the proceeding that a proceeding concerning the custody of the child was pending in another state before the court assumed jurisdiction it shall stay the proceeding and communicate with the court in which the other proceeding is pending to the end that the issue may be litigated in the more appropriate forum and that information be exchanged in accordance with Sections 78-45c-19 through 78-45c-22. If a court of this state has made a custody decree before being informed of a pending proceeding in a court of another state it shall immediately inform that court of the fact. If the court is informed that a proceeding was commenced in another state after it assumed jurisdiction it shall likewise inform the other court to the end that the issues may be litigated in the more appropriate forum.

1980

78-45c-7. Declining jurisdiction on finding of inconvenient forum — Factors in determination — Communication with other court — Awarding costs.

(1) A court which has jurisdiction under this act to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.

(2) A finding of inconvenient forum may be made upon the court's own motion or upon motion of a party or a guardian ad litem or other representative of the child.

(3) In determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that another state assume jurisdiction. For this purpose it may take into account the following factors, among others:

(a) if another state is or recently was the child's home state;

(b) if another state has a closer connection with the child and his family or with the child and one or more of the contestants;

(c) if substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state;

(d) if the parties have agreed on another forum which is no less appropriate; and

(e) if the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in Section 78-45c-1.

(4) Before determining whether to decline or retain jurisdiction the court may communicate with a court of another state and exchange information pertinent to the assumption of jurisdiction by either court with a view to assuring that jurisdiction will be exercised by the more appropriate court and that a forum will be available to the parties.

(5) If the court finds that it is an inconvenient forum and that a court of another state is a more appropriate forum, it may dismiss the proceedings, or it may stay the proceedings upon condition that a custody proceeding be promptly commenced in another named state or upon any other conditions which

may be just and proper, including the condition that a moving party stipulate his consent and submission to the jurisdiction of the other forum.

(6) The court may decline to exercise its jurisdiction under this act if a custody determination is incidental to an action for divorce or another proceeding while retaining jurisdiction over the divorce or other proceeding.

(7) If it appears to the court that it is clearly an inappropriate forum it may require the party who commenced the proceedings to pay, in addition to the costs of the proceedings in this state, necessary travel and other expenses, including attorney's fees, incurred by other parties or their witnesses. Payment is to be made to the clerk of the court for remittance to the proper party.

(8) Upon dismissal or stay of proceedings under this section the court shall inform the court found to be the more appropriate forum of this fact, or if the court which would have jurisdiction in the other state is not certainly known, shall transmit the information to the court administrator or other appropriate official for forwarding to the appropriate court.

(9) Any communication received from another state informing this state of a finding of inconvenient forum because a court of this state is the more appropriate forum shall be filed in the custody registry of the appropriate court. Upon assuming jurisdiction the court of this state shall inform the original court of this fact.

1980

78-45c-8. Misconduct of petitioner as basis for refusing jurisdiction — Notice to another jurisdiction — Ordering petitioner to appear in other court or to return child — Awarding costs.

(1) If the petitioner for an initial decree has wrongfully taken the child from another state or has engaged in similar reprehensible conduct the court may decline to exercise jurisdiction for purposes of adjudication of custody if this is just and proper under the circumstances.

(2) Unless required in the interest of the child, the court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner, without consent of the person entitled to custody has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody. If the petitioner has violated any other provision of a custody decree of another state the court may decline to exercise its jurisdiction if this is just and proper under the circumstances.

(3) Where the court declines to exercise jurisdiction upon petition for an initial custody decree pursuant to Subsection (1), the court shall notify the parent or other appropriate person and the prosecuting attorney of the appropriate jurisdiction in the other state. If a request to that effect is received from the other state, the court shall order the petitioner to appear with the child in a custody proceeding instituted in the other state in accordance with Section 78-45c-20. If no such request is made within a reasonable time after such notification, the court may entertain a petition to determine custody by the petitioner if it has jurisdiction pursuant to Section 78-45c-2.

(4) Where the court refuses to assume jurisdiction to modify the custody decree of another state pursuant to Subsection (2) or pursuant to Section 78-45c-14, the court shall notify the person who has legal custody under the decree of the other state and

the prosecuting attorney of the appropriate jurisdiction in the other state and may order the petitioner to return the child to the person who has legal custody. If it appears that the order will be ineffective and the legal custodian is ready to receive the child within a period of a few days, the court may place the child in a foster care home for such period, pending return of the child to the legal custodian. At the same time, the court shall advise the petitioner that any petition for modification of custody must be directed to the appropriate court of the other state which has continuing jurisdiction, or, in the event that that court declines jurisdiction, to a court in a state which has jurisdiction pursuant to Section 78-45c-3.

(5) In appropriate cases a court dismissing a petition under this section may charge the petitioner with necessary travel and other expenses, including attorney's fees and the cost of returning the child to another state. 1980

78-45c-9. Information as to custody of child and litigation concerning required in pleadings — Verification — Continuing duty to inform court.

(1) Every party in a custody proceeding in his first pleading or in an affidavit attached to that pleading shall give information under oath as to the child's present address, the places where the child has lived within the last five years, and the names and present addresses of the persons with whom the child has lived during that period. In this pleading or affidavit every party shall further declare under oath as to each of the following whether:

(a) he has participated, as a party, witness, or in any other capacity, in any other litigation concerning the custody of the same child in this or any other state;

(b) he has information of any custody proceeding concerning the child pending in a court of this or any other state; and

(c) he knows of any person not a party to the proceedings who has physical custody of the child or claims to have custody or visitation rights with respect to the child.

(2) If the declaration as to any of the above items is in the affirmative the declarant shall give additional information under oath as required by the court. The court may examine the parties under oath as to details of the information furnished and as to other matters pertinent to the court's jurisdiction and the disposition of the case.

(3) Each party has a continuing duty to inform the court of any custody proceeding concerning the child in this or any other state of which he obtained information during this proceeding. 1980

78-45c-10. Joinder of persons having custody or claiming custody or visitation rights.

If the court learns from information furnished by the parties pursuant to Section 78-45c-9 or from other sources that a person not a party to the custody proceeding has physical custody of the child or claims to have custody or visitation rights with respect to the child, it shall order that person to be joined as a party and to be duly notified of the pendency of the proceeding and of his joinder as a party. If the person joined as a party is outside this state he shall be served with process or otherwise notified in accordance with Section 78-45c-5. 1980

78-45c-11. Ordering party to appear — Enforcement — Out-of-state party — Travel and other expenses.

(1) The court may order any party to the proceeding who is in this state to appear personally before the court. If that party has physical custody of the child the court may order that he appear personally with the child. If the party who is ordered to appear with the child cannot be served or fails to obey the order, or it appears the order will be ineffective, the court may issue a warrant of arrest against such party to secure his appearance with the child.

(2) If a party to the proceeding whose presence is desired by the court is outside this state with or without the child the court may order that the notice given under Section 78-45c-5 include a statement directing that party to appear personally with or without the child and declaring that failure to appear may result in a decision adverse to that party.

(3) If a party to the proceeding who is outside this state is directed to appear under Subsection (2) or desires to appear personally before the court with or without the child, the court may require another party to pay to the clerk of the court travel and other necessary expenses of the party so appearing and of the child if this is just and proper under the circumstances. 1980

78-45c-12. Parties bound by custody decree — Conclusive unless modified.

A custody decree rendered by a court of this state which had jurisdiction under Section 78-45c-3, binds all parties who have been served in this state or notified in accordance with Section 78-45c-5 or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard. As to these parties the custody decree is conclusive as to all issues of law and fact decided and as to the custody determination made unless and until that determination is modified pursuant to law, including the provisions of this act. 1980

78-45c-13. Recognition and enforcement of foreign decrees.

The courts of this state shall recognize and enforce an initial or modification decree of a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with this act or which was made under factual circumstances meeting the jurisdictional standards of the act, so long as this decree has not been modified in accordance with jurisdictional standards substantially similar to those of this act. 1980

78-45c-14. Modification of foreign decree — Prerequisites — Factors considered.

(1) If a court of another state has made a custody decree, a court of this state shall not modify that decree unless (a) it appears to the court of this state that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this act or has declined to assume jurisdiction to modify the decree and (b) the court of this state has jurisdiction.

(2) If a court of this state is authorized under Subsection (1) and Section 78-45c-8 to modify a custody decree of another state it shall give due consideration to the transcript of the record and other documents of all previous proceedings submitted to it in accordance with Section 78-45c-22. 1980

78-45c-15. Filing foreign decree — Effect — Enforcement — Award of expenses.

(1) A certified copy of a custody decree of another state may be filed in the office of the clerk of any district court of this state. The clerk shall treat the

decree in the same manner as a custody decree of the district court of this state. A custody decree so filed has the same effect and shall be enforced in like manner as a custody decree rendered by a court of this state.

(2) A person violating a custody decree of another state which makes it necessary to enforce the decree in this state may be required to pay necessary travel and other expenses, including attorney's fees, incurred by the party entitled to the custody or his witnesses. 1980

78-45c-16. Registry maintained by clerk of court — Documents entered.

The clerk of each district court shall maintain a registry in which he shall enter all of the following:

- (1) certified copies of custody decrees of other states received for filing;
- (2) communications as to the pendency of custody proceedings in other states;
- (3) communications concerning a finding of inconvenient forum by a court of another state; and
- (4) other communications or documents concerning custody proceedings in another state which may affect the jurisdiction of a court of this state or the disposition to be made by it in a custody proceeding. 1980

78-45c-17. Certified copies of decrees furnished by clerk of court.

The clerk of a district court of this state, at the request of the court of another state or at the request of any person who is affected by or has a legitimate interest in a custody decree, shall certify and forward a copy of the decree to that court or person. 1980

78-45c-18. Taking testimony of persons in other states.

In addition to other procedural devices available to a party, any party to the proceeding or a guardian ad litem or other representative of the child may adduce testimony of witnesses, including parties and the child, by deposition or otherwise, in another state. The court on its own motion may direct that the testimony of a person be taken in another state and may prescribe the manner in which and the terms upon which the testimony shall be taken. 1980

78-45c-19. Request to court of another state to take evidence, to make studies or to order appearance of party — Payment of costs.

(1) A court of this state may request the appropriate court of another state to hold a hearing to adduce evidence, to order a party to produce or give evidence under other procedures of that state, or to have social studies made with respect to the custody of a child involved in proceedings pending in the court of this state; and to forward to the court of this state certified copies of the transcript of the record of the hearing, the evidence otherwise adduced, or any social studies prepared in compliance with the request. The cost of the services may be assessed against the parties.

(2) A court of this state may request the appropriate court of another state to order a party to custody proceedings pending in the court of this state to appear in the proceedings, and if that party has physical custody of the child, to appear with the child. The request may state that travel and other necessary expenses of the party and of the child whose appearance is desired will be assessed against another party or will otherwise be paid. 1980

78-45c-20. Taking evidence for use in court of another state — Ordering appearance in another state — Costs — Enforcement.

(1) Upon request of the court of another state the courts of this state which are competent to hear custody matters may order a person in this state to appear at a hearing to adduce evidence or to produce or give evidence under other procedures available in this state. A certified copy of the transcript of the record of the hearing or the evidence otherwise adduced shall be forwarded by the clerk of the court to the requesting court.

(2) A person within this state may voluntarily give his testimony or statement in this state for use in a custody proceeding outside this state.

(3) Upon request of the court of another state a competent court of this state may order a person in this state to appear alone or with the child in a custody proceeding in another state. The court may condition compliance with the request upon assurance by the other state that travel and other necessary expenses will be advanced or reimbursed. If the person who has physical custody of the child cannot be served or fails to obey the order, or it appears the order will be ineffective, the court may issue a warrant of arrest against such person to secure his appearance with the child in the other state. 1980

78-45c-21. Preservation of records of proceedings — Furnishing copies to other state courts.

In any custody proceeding in this state the court shall preserve the pleadings, orders and decrees, any record that has been made of its hearings, social studies, and other pertinent documents until the child reaches 18 years of age. Upon appropriate request of the court of another state the court shall forward to the other court certified copies of any or all of such documents. 1980

78-45c-22. Requesting court records from another state.

If a custody decree has been rendered in another state concerning a child involved in a custody proceeding pending in a court of this state, the court of this state upon taking jurisdiction of the case shall request of the court of the other state a certified copy of the transcript of any court record and other documents mentioned in Section 78-45c-21. 1980

78-45c-23. Foreign countries — Application of general policies.

The general policies of this act extend to the international area. The provisions of this act relating to the recognition and enforcement of custody decrees of other states apply to custody decrees and decrees involving legal institutions similar in nature to custody rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons. 1980

78-45c-24. Priority on court calendar.

Upon the request of a party to a custody proceeding which raises a question of existence or exercise of jurisdiction under this act the case shall be given calendar priority and handled expeditiously. 1980

78-45c-25. Notices — Orders to appear — Manner of service.

(1) Whenever the terms of this act impose a duty upon the court to notify a party or court of a particular fact or action, such notification may be accom-

plished by the clerk of the court or a party to the action upon order of the court.

(2) Orders of the court for parties or persons to appear before the court in accordance with the terms of this act shall include legal and sufficient service of process in accordance with the Utah Rules of Civil Procedure unless otherwise ordered for good cause shown.

1980

78-45c-26. Short title.

This act may be cited as the "Utah Uniform Child Custody Jurisdiction Act."

1980

28 USCS § 1738A

§ 1738A. Full faith and credit given to child custody determinations

(a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another State.

(b) As used in this section, the term—

(1) "child" means a person under the age of eighteen;

(2) "contestant" means a person, including a parent, who claims a right to custody or visitation of a child;

(3) "custody determination" means a judgment, decree, or other order of a court providing for the custody or visitation of a child, and includes permanent and temporary orders, and initial orders and modifications;

(4) "home State" means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period;

(5) "modification" and "modify" refer to a custody determination which modifies, replaces, supersedes, or otherwise is made subsequent to, a prior custody determination concerning the same child, whether made by the same court or not;

(6) "person acting as a parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody;

(7) "physical custody" means actual possession and control of a child, and

(8) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States.

(c) A child custody determination made by a court of a State is consistent with the provisions of this section only if—

(1) such court has jurisdiction under the law of such State; and

(2) one of the following conditions is met:

(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

(B)(i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships.

(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse;

(D)(i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction, or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section

(d) The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

(e) Before a child custody determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child

(f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if—

(1) it has jurisdiction to make such a child custody determination, and

(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination

(g) A court of a State shall not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody determination

(Added Dec 28, 1980, P.L. 96-611, § 8(a), 94 Stat. 3569)